

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD TYRONE GARDNER,

Defendant-Appellant.

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UNPUBLISHED

September 29, 2005

No. 254341

Wayne Circuit Court

LC No. 03-010445-01

Before: Bandstra, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with felonious assault, felony-firearm, felon in possession of a firearm, MCL 750.224f, and reckless use of a firearm, MCL 752.863a, in connection with allegations that he fired shots in the direction of a residence occupied by complainant Shandell Lowery, and that he pointed the gun at complainant. Complainant testified that after she argued with defendant, he approached her home, fired shots, and pointed the gun at her. Complainant stated that several children were present during the incident, and that her thirteen-year-old cousin Deja was on the porch when the incident occurred. Deja Lowery, who had been present in the courtroom during complainant's testimony both at the preliminary examination and at trial, testified that she saw defendant fire the gun into the air, retrieve shell casings from the ground, and point the gun at complainant. A defense witness denied seeing Deja Lowery at the residence.

The trial court accepted the testimony of complainant and Deja Lowery, and found defendant guilty of felonious assault and felony-firearm. The trial court acquitted defendant of felon in possession of a firearm and reckless use of a firearm, but gave no reasons for doing so.

The elements of felonious assault are: (1) an assault; (2) with a dangerous weapon; and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). An assault is an attempt to commit a battery, or an unlawful act that places another person in reasonable apprehension of receiving an immediate battery. *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581

(1995). The elements of felony-firearm are: (1) the possession of a firearm; (2) during the commission of, or the attempt to commit, a felony. MCL 750.227b.

The trial court has the authority, at the request of a party or sua sponte, to order witnesses excluded from the courtroom so that they cannot hear the testimony of other witnesses. MRE 615. The decision to sequester witnesses is within the discretion of the trial court. *People v Jehnsen*, 183 Mich App 305, 309; 454 NW2d 250 (1990).

Defendant argues that the trial court abused its discretion and denied him a fair trial by failing to sequester Deja Lowery during complainant's testimony. He contends that had Deja Lowery not testified, it is likely that the trial court would have acquitted him. We disagree, and affirm defendant's convictions.

Defense counsel did not request that Deja Lowery be sequestered at either the preliminary examination or at trial, and did not object to her presence in the courtroom during complainant's trial testimony. Therefore, we review defendant's argument for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant's assertion that he likely would have been acquitted of all charges had Deja Lowery not testified is not supported by the record. Complainant testified that defendant pointed a gun at her, and that she was frightened by defendant's action. This testimony, which the trial court was entitled to accept as credible, *People v Marji*, 180 Mich App 525, 542; 447 NW2d 835 (1989), was sufficient to establish the elements of felonious assault and felony-firearm. *Davis, supra*; *Grant, supra*; MCL 750.227b. Defendant has not established that the failure to sequester Deja Lowery resulted in plain error. *Carines, supra*.

We affirm.

/s/ Richard A. Bandstra

/s/ Janet T. Neff

/s/ Pat M. Donofrio